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In the Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA, PETITIONER

v.

JOHN DOE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

ANDREW L. FREY
Deputy Solicitor General

SAMUEL A. ALITO, JR.
Assistant to the Solicitor General

JOEL M. GERSHOWITZ
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether the Fifth Amendment privilege against compelled self-incrimination may be properly invoked by a sole proprietor in response to a subpoena for preexisting business records, many of which were not prepared by him and are of a type kept by virtually all businesses.

2. Whether a person may properly resist compliance with a subpoena duces tecum on the ground that the act of production would be self-incriminating, despite the availability of use immunity with respect to the act of production.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 680 F.2d 327. The opinion of the district court (Pet. App. 23a-27a) is reported at 541 F. Supp. 1.

JURISDICTION

The judgment of the court of appeals was entered on June 10, 1982. A petition for rehearing was denied on August 10, 1982. On October 1, 1982, Justice Brennan extended the time for filing a petition for a writ of certiorari to and including November 8, 1982. The petition was filed on that date and was granted on May 2, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment provides in pertinent part:

No person * * * shall be compelled in any criminal case to be a witness against himself * * *.

STATEMENT

1. In the fall of 1980, a federal grand jury in Newark, New Jersey, was investigating corruption in the awarding of county and municipal contracts, as well as related tax violations. The investigation focused in part on the activities of respondent John Doe [1] and several companies (organized as sole proprietorships) through which he did business with units of local government.

In November and December 1980, the grand jury caused five subpoenas to be served on respondent calling for the production of numerous business records relating to his various companies (Pet. App. 28a-36a). The first two subpoenas demanded the production of the telephone toll records of several of his companies, as well as "all records including but not limited to bank statements, cancelled checks, check stubs and deposit tickets, for the period January 1, 1977 to present," for four bank accounts held by respondent or his companies (*id.* at 28a-31a).

The third subpoena required respondent to produce "any and all records as per the attached Schedule A for [one of respondent's companies] for the period January 1, 1976 to present" (*id.* at 32a-33a). Schedule A listed 28 categories of common business records (*id.* at 33a).[2]

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[1] Because of the ongoing grand jury inquiry, the court of appeals granted the government's request not to disclose respondent's name or any details that would identify him (see Pet. App. 2a n.1). For this reason, we did not use respondent's name in our petition or the appendix thereto. Later and without prior notice to the government, the district court's opinion, which had originally been marked "not for publication" (see Pet. App. 23a), was published at 541 F.Supp. 1. This opinion identifies respondent and his companies. We have nevertheless omitted respondent's name and other identifying details from this brief.

[2] These were:

1. General ledgers.
2. General journals.
3. Cash disbursement journals.
4. Petty cash books and vouchers.

[Continued]

The fourth subpoena demanded production of a similar list of business records belonging to another company (*id.* at 34a-35a). The final subpoena required respondent to testify and produce "all bank statements and cancelled checks for the period January 1, 1976 to present" for accounts "at the Royal Bank of Canada, Georgetown, Grand Cayman Islands" belonging to two other companies (*id.* at 36a).

Respondent moved to quash all five subpoenas on Fifth Amendment grounds, and the district court granted his motion except with respect to those documents required to be kept by law[3] (*id.* at 22a). In its opinion, the court

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[2] [Continued]

5. Purchase journals.
6. Vouchers.
7. Paid bills.
8. Invoices.
9. Cash receipts journal.
10. Billings.
11. Bank statements.
12. Cancelled checks and check stubs.
13. Payroll records.
14. Contracts and copies of contracts, including all retainer agreements.
15. Financial statements.
16. Bank deposit tickets.
17. Retained copies of income tax returns.
18. Retained copies of payroll tax returns.
19. Accounts payable ledgers.
20. Accounts receivable ledgers.
21. Telephone company statement of calls and telegrams, and all telephone toll slips.
22. Records of all escrow, trust or fiduciary accounts maintained on behalf of clients.
23. Safe deposit box records.
24. Records all purchases and sale of all stocks and bonds.
25. A complete list of all partners, associates and employees, together with their home addresses.
26. All W-2 forms of each partner, associate and employee.
27. Workpapers.
28. Copies of Tax Returns.

[3] Production of such documents is not protected by the Fifth Amendment. See *Shapiro* v. *United States*, 335 U.S. 1, 33 (1948).

seemingly accepted the government's argument that the documents' contents were themselves not privileged (see *id.* at 25a). The court wrote, however (*id.* at 25a-26a; emphasis in original):

> [T]he relevant inquiry is * * * whether the *act* of producing the documents has communicative aspects which warrant Fifth Amendment protection. *Fisher* v. *United States*, 425 U.S. 391 (1976). * * *
>
> * * * * *
>
> With few exceptions, enforcement of the subpoenas would compel [respondent] to admit that the records exist, that they are in his possession, and that they are authentic. These communications, if made under compulsion of a court decree, would violate [respondent's] Fifth Amendment rights.

The district court reached this conclusion even though the government had represented on the record that no subsequent use would be made of respondent's act of production and had suggested that respondent be given the "functional equivalent of use immunity" with respect to the act of production (J.A. 25, 28-29, 34-35; C.A. App. 75a-76a; Memorandum in Support of Motion for Reconsideration at 21-22).

2. The court of appeals affirmed (Pet. App. 1a-21a). The court first rejected the government's argument that a sole proprietor, like an officer of a corporation or unincorporated association or a member of a partnership, should not be permitted to assert the Fifth Amendment privilege when served with a subpoena for the records of his business or organization. The court nevertheless acknowledged that "the Government's position has considerable analytic appeal" (*id.* at 6a) and that permitting a sole proprietor to assert the Fifth Amendment privilege " 'only because of the form of business organization' " he has chosen results in " 'an irrational hole in the constitutional system of regulation of crime detection' " (*id.* at 6a n.3, quoting *In re Grand Jury Proceedings (Martinez)*, 626 F.2d 1051, 1056 (1st Cir. 1980)).

The court next concluded that respondent was entitled to resist the subpoenas at issue here on Fifth Amendment grounds. The court stated flatly that "an individual's business papers, as well as his personal records, cannot be subpoenaed by a grand jury" (Pet. App. 14a). The court began by noting the rule, derived from *Boyd* v. *United States*, 116 U.S. 616, 630 (1886), that the Fifth Amendment protects an individual against the compelled production of his private papers (Pet. App. 8a). The court acknowledged that *Fisher* v. *United States*, 425 U.S. 391 (1976), had "seemingly diverged from" that rule by concluding that "the fifth amendment, rather than existing to shield certain private writings from discovery by the Government, 'applies only when the accused is compelled to make a *testimonial* communication that is *incriminating*' " (Pet. App. 9a, quoting *Fisher*, 425 U.S. at 408). The court of appeals nevertheless asserted (Pet. App. 11a n.7) that "lower federal courts, including this Court, have continued to recognize *Boyd's* protection-of-private-papers principle."

The court of appeals also concluded that respondent was entitled to invoke the Fifth Amendment privilege because, in the court's view, the act of producing the documents amounted to a potentially incriminating communication (Pet. App. 14a-17a). The court distinguished *Fisher*, where a similar argument was rejected, on the ground that there " '[t]he existence and location of the papers [was] a foregone conclusion' " (*id.* at 15a, quoting *Fisher*, 425 U.S. at 410), whereas in this case there was "nothing in the record that would indicate that the United States knows, *as a certainty*, that each of the myriad documents demanded by the five subpoenas in fact is in [respondent's] possession or subject to his control" (Pet. App. 15a; emphasis added).

The court added that enforcement of the subpoenas would require respondent to authenticate the documents sought (Pet. App. 15a). Observing that "many (although certainly not all) of the subpoenaed records * * * most

likely were prepared by the appellee," the court stated (*ibid.*) that "[t]he record contains no explanation by the United States as to how documents of this sort could be authenticated without the appellee's explicit or implicit participation."

The court next held (Pet. App. 18a-19a) that respondent was entitled to rest upon a blanket assertion of the Fifth Amendment privilege with respect to all the documents sought by the subpoenas, including those that respondent had not prepared. The court relied (*id.* at 18a & n.17) upon the government's acknowledgment that the contents of the documents sought might tend to incriminate respondent.

Finally, the court held that respondent could assert the Fifth Amendment privilege despite the government's representation that the act of producing the documents would not be used against him and despite the government's request that he be afforded the functional equivalent of use immunity with respect to the act of production, because the immunity proposal was not described with sufficient specificity (Pet. App. 19a-20a).[4]

SUMMARY OF ARGUMENT

This case presents the question whether a sole proprietor served with a subpoena *duces tecum* for his company's standard business records may properly resist compliance by asserting the Fifth Amendment privilege.

I.

It is clear that the Fifth Amendment does not protect the contents of business records voluntarily prepared be-

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[4] Following the quashing of the subpoenas at issue here, respondent was indicted and convicted of various charges stemming from the grand jury investigation. Execution of sentence was suspended, and respondent was placed on probation and fined. However, the grand jury investigation is continuing, production of the requested documents is still needed, and there remains the possibility that the contents of the documents would incriminate respondent as to offenses other than those for which he has already been convicted. Accordingly, the case is not moot.

fore a subpoena for them is issued. The Fifth Amendment's provision that "[n]o person * * * shall be compelled in any criminal case to be a witness against himself" was intended to preclude the practice of forcing suspects "to admit guilt from their own lips." *Andresen* v. *Maryland*, 427 U.S. 463, 470 (1976), quoting *Michigan* v. *Tucker*, 417 U.S. 433, 440 (1974). The privilege therefore applies only when the government compels an individual to make a self-incriminating testimonial communication.

When an individual voluntarily prepares, collects, or maintains documents, no compulsion is present, and the Fifth Amendment privilege does not apply. If the individual is subsequently served with a subpoena *duces tecum* seeking those documents, he is compelled by the subpoena to produce them but not "to restate, repeat, or affirm the truth of the contents of the documents sought. Therefore, the Fifth Amendment would not be violated by the fact alone that the papers on their face might incriminate the [individual], for the privilege protects a person only against being incriminated by his own compelled testimonial communications." *Fisher* v. *United States*, 425 U.S. 391, 409 (1976)). In short, the Fifth Amendment privilege does not shield the contents of documents that were voluntarily prepared, collected, and maintained, because the contents of such documents are not the product of proscribed government compulsion. This broad principle obviously applies whether or not the person upon whom the subpoena is served is the author or owner of the documents.

In holding that the contents of a sole proprietorship's business records are privileged even though created without government compulsion, the court of appeals relied upon *Boyd* v. *United States*, 116 U.S. 616 (1886), which the court interpreted as creating a zone of privacy shielding "private papers," including the standard business records of companies doing business as sole proprietorships. In fact, however, *Boyd* was not based upon a "protection-of-private-papers principle" (Pet. App. 11a n.7) but upon a series of rules long since "washed away" (*Fisher*, 425

U.S. at 409). Most notably, *Boyd* rested upon the proposition that the government could not search for or seize "mere evidence" but only fruits or instrumentalities of crime. That rule, which drew no distinction between papers and other forms of property, was overturned in *Warden* v. *Hayden*, 387 U.S. 294 (1967).

Granting privileged status to the contents of a sole proprietorship's records is also inconsistent in policy with a long line of decisions of this Court holding that the Fifth Amendment provides no grounds for resisting subpoenas demanding the records of corporations, partnerships, and unincorporated associations even if production of the records could incriminate their custodian. As far as the Fifth Amendment is concerned, there is no principled reason for treating the records of sole proprietorships any differently. The difference between a corporation or partnership and a sole proprietorship is often nothing more than a legal formality and does not inherently reflect the size, structure, activities, or longevity of the businesses. It simply makes no sense to hold that the records of a large company doing business as a sole proprietorship are protected by a zone of personal privacy, while the records of a one-person corporation are held in representative capacity and are thus outside the scope of Fifth Amendment protection.

It is also illogical to hold that the Fifth Amendment protects the contents of preexisting business records when they are sought by subpoena, since the Court held in *Andresen* that the contents of seized papers are not privileged under the Fifth Amendment. To be sure, a subpoena compels production of the documents whereas a search does not, but that does not explain why the privileged status of the documents' *contents* should differ.

While it is our submission that the Fifth Amendment does not protect the contents of any papers created without government compulsion, the "zone of privacy" rationale in any event does not support recognition of the privilege in a case like this. The subpoena called only for common types of business records such as bank state-

ments, vouchers, invoices, and payroll records. It did not seek records like diaries or personal letters that touch upon more intimate aspects of an individual's life. The possibility remains that other constitutional guarantees may regulate the power to compel production of such documents.

II.

A.

While *Fisher* made clear that the contents of preexisting business records are not privileged under the Fifth Amendment, it left open the possibility that the act of producing such documents might be considered testimonial, either because it concedes their existence, possession, and control or because it indicates the witness's belief that the papers produced are those described in the subpoena (see 425 U.S. at 410). We submit, however, that where the documents sought are standard business records, the act of production generally does not rise to the level of testimonial self-incrimination. By producing such records, a sole proprietor may tacitly admit that they exist and are in his possession. But since such documents are kept by virtually every business from the smallest family concern to the largest conglomerate, these tacit assertions "add[] little or nothing to the sum total of the Government's information" (*Fisher*, 425 U.S. at 411) and are thus not sufficiently testimonial to implicate the Fifth Amendment. Furthermore, the fact that a sole proprietorship possesses the sort of documents maintained by virtually all other businesses (as distinct from the contents of the document) is hardly incriminating.

The act of producing documents might also be considered testimonial insofar as it authenticates them. But in the vast majority of cases, such tacit authentication of standard business records is neither sufficiently testimonial nor sufficiently incriminating to justify assertion of the Fifth Amendment privilege. Authentication is a narrow, technical requirement for the admissibility of evidence at trial. While a sole proprietor's act of producing

documents in response to a subpoena should, if not privileged, suffice for authentication, the burden on the government of authenticating standard business records by other means is slight, and the testimonial value of the sole proprietor's tacit authentication is correspondingly small.

By the same token, any tacit authentication inherent in the act of production is unlikely to be incriminating. By producing documents in response to a subpoena, an individual merely expresses his belief that they are those described in the subpoena. The individual does not vouch for the truth of their contents. Furthermore, tacit authentication is not alone sufficient for admission of business records, since other requirements, most notably the hearsay rule, must also be satisfied.

In special circumstances, the act of producing business records might constitute testimonial self-incrimination, but unless the individual asserting the privilege can make the requisite showing in a particular case, his claim should be denied. Here, the courts below erroneously permitted respondent to make a blanket assertion of the privilege without any concrete showing of how the production of any of the requested documents, many of which were generated by others or were self-authenticating, could incriminate him.

B.

Whether in particular circumstances the act of producing documents amounts to testimonial self-incrimination is admittedly not always an easy question. Litigation concerning this issue is burdensome for the judiciary and often delays and consequently interferes with important grand jury investigations. Yet this question is of little intrinsic importance to the parties, except for its potential utility in thwarting the investigation. It is hotly contested in many cases only because its resolution often dictates whether the grand jury will gain access to the documents' unprivileged contents. In reality both the government and the individual resisting the subpoena are

generally concerned only with access to contents and not with any tacit assertions implicit in the act of production.

The simple and obvious solution to this problem is to require compliance with subpoenas for standard business records but to recognize that the compulsion inherent in the subpoena leads to conferral of automatic constructive use immunity on the witness who has invoked his privilege, precluding the introduction against him in any subsequent criminal proceedings of evidence of the act of production. This procedure obviates the need for unproductive litigation, permits prompt grand jury inspection of the documents' unprivileged contents, and fully protects the Fifth Amendment rights of the person served with the subpoena, since he is assured that any testimony inherent in the act of production will not be used against him. Much the same result may be achieved by a formal grant of immunity with respect to the act of production, but we see no reason why this more burdensome procedure need be employed.

In the present case, the government gave binding assurances that the act of production would not be used against respondent and suggested that respondent be given corresponding immunity. There was, accordingly, no valid reason for quashing the subpoenas in this case.

ARGUMENT

THE FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION MAY NOT PROPERLY BE INVOKED BY A SOLE PROPRIETOR IN RESPONSE TO A SUBPOENA FOR PREEXISTING BUSINESS RECORDS

The court of appeals affirmed the quashing of the subpoenas duces tecum in this case on essentially two grounds: first, that the contents of a sole proprietorship's business records are privileged under the Fifth Amendment; and, second, that respondent's act of producing those documents would necessarily amount to compelled testimonial self-incrimination. As we discuss in Point I, logic and precedent establish that the contents of preexisting business records are not privileged under the Fifth

Amendment. We also show (Point IIA) that the act of producing standard business records does not ordinarily rise to the level of testimonial self-incrimination and has not been shown to do so here. In Point IIB we argue that even if the act of producing the documents implicated respondent's Fifth Amendment rights, he was not entitled to resist the subpoenas because of the availability of use immunity with respect to the act of production.

I. The Contents Of A Sole Proprietorship's Preexisting Business Records Are Not Privileged Under The Fifth Amendment

A. The Fifth Amendment provides that "[n]o person * * * shall be compelled in any criminal case to be a witness against himself." As the Court often has noted, the development of this protection was in part a response to certain historical practices, such as ecclesiastical inquisitions and the proceedings of the Star Chamber, " 'which placed a premium on compelling subjects of the investigation to admit guilt from their own lips.' " *Andresen* v. *Maryland*, 427 U.S. 463, 470 (1976), quoting *Michigan* v. *Tucker*, 417 U.S. 433, 440 (1974). This constitutional prohibition "demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth." *Miranda* v. *Arizona*, 384 U.S. 436, 460 (1966).

Consistent with the language and history of the Fifth Amendment, this Court has repeatedly indicated that the privilege against self-incrimination applies only when the accused is *compelled* to make an incriminating statement. See, *e.g.*, *Andresen*, 427 U.S. at 477; *Fisher* v. *United States*, 425 U.S. 391, 399 (1976); *Olmstead* v. *United States*, 277 U.S. 438, 462 (1928). As the Court stated in *Andresen* (427 U.S. at 477), "unless incriminating testimony is 'compelled,' any invasion of privacy is outside the scope of the Fifth Amendment's protection."

This Court has also consistently held that the privilege applies only when the accused is forced to make a *testimonial* communication that is incriminating and not when

he is forced to become the source of "real or physical" evidence. See *Gilbert* v. *California*, 388 U.S. 263, 265-267 (1967); *United States* v. *Wade*, 388 U.S. 218, 222-223 (1967); *Schmerber* v. *California*, 384 U.S. 757, 764 (1966); *Holt* v. *United States*, 218 U.S. 245 (1910).

It follows from these principles that the Fifth Amendment does not protect an individual against use by the government of incriminating documents voluntarily prepared by him, and that a subpoena for such documents may not be resisted solely because of the self-incriminatory potential of their contents. Although the act of turning over a document pursuant to subpoena is most assuredly compelled, it involves no *testimony* about the contents of the document,[5] but merely their physical delivery.[6] And to the extent that the document itself is testimonial in nature, the Fifth Amendment is inapplicable because the creation of the document did not spring from the compulsion of the subpoena. As one leading authority has stated (E. Cleary, *McCormick on Evidence* § 128, at 269 (2d ed. 1972)), preparation of such documents

> may or may not have been testimonial, depending upon whether [the author] intended that the transcription serve the function of communicating his thought to another individual, but in any event authorizing the use of such transcriptions would not encourage police to exert the types of coercion that the privilege historically protected against, because by definition these transcriptions would have been made before the opportunity for coercion existed.

B. Any doubt that the contents of preexisting business documents are not privileged under the Fifth Amendment

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[5] As we will presently have occasion to discuss, the act of producing a document might be considered testimonial in other respects. See pages 30-38, *infra*.

[6] See also 8 J. Wigmore, *Evidence* § 2264, at 380 (McNaughton rev. 1961) (stating that the contents of documents are not privileged because they are "already in existence and not desired to be first written and created by a testimonial act or utterance of the person in response to the process * * *").

is dispelled by this Court's decision in *Fisher* v. *United States*, *supra*. There, taxpayers under investigation by the Internal Revenue Service retrieved papers from their accountants and delivered them to their attorneys (425 U.S. at 394). None of the documents was prepared by the taxpayers, but the documents contained information taken from the taxpayers' books and records (*ibid.*). The Court held that the attorneys could not resist an IRS summons on the ground of attorney-client privilege because the Fifth Amendment would not have prevented compelled disclosure of the documents if they had remained in the taxpayers' possession. The Court explained (*id.* at 409):

> A subpoena served on a taxpayer requiring him to produce an accountant's workpapers in his possession without doubt involves substantial compulsion. But it does not compel oral testimony; nor would it ordinarily compel the taxpayer to restate, repeat, or affirm the truth of the contents of the documents sought. Therefore, the Fifth Amendment would not be violated by the fact alone that the papers on their face might incriminate the taxpayer, for the privilege protects a person only against being incriminated by his own compelled testimonial communications.

The Court went on to stress that the Fifth Amendment does not protect any privacy interest in the contents of documents even when written by the person asserting the privilege (425 U.S. at 410 n.11).[7] Rather, the Court observed, the privilege applies only when the accused is *compelled* to make a testimonial communication that is incriminating (*id.* at 399, 408), and therefore "unless the Government has compelled the subpoenaed person to write the document * * * the fact that it was written by

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[7] That the Fifth Amendment privilege does not exist for the purpose of protecting personal privacy is manifest from the fact that it may be overridden by a grant of immunity that fully protects against prosecutive use. *Kastigar* v. *United States*, 406 U.S. 441 (1972).

him is not controlling with respect to the Fifth Amendment issue" (*id.* at 410 n.11). The Court recognized (*id.* at 410), however, that in some circumstances the compelled act of producing a document pursuant to subpoena might be considered the equivalent of incriminating testimony—either because the act concedes "the existence of the papers demanded and their possession or control by the taxpayer" or because it serves to authenticate them.

It is thus clear from *Fisher* that although the *act of producing* a document might arguably constitute a testimonial act within the protection of the privilege, a person cannot avoid compliance with a documentary subpoena based solely upon the *contents* of the document. See *United States* v. *Schlansky*, No. 82-5200 (6th Cir. June 16, 1983, slip op. 5; *United States* v. *Namer*, 680 F.2d 1088, 1092 & n.8 (5th Cir. 1982); *United States* v. *Doe*, 628 F.2d 694, 695 (1st Cir. 1980); *In re Grand Jury Proceedings (Martinez)*, 626 F.2d 1051, 1055 (1st Cir. 1980); *United States* v. *Bray*, 546 F.2d 851, 855 (10th Cir. 1976). This is so because the writing of the document was not itself compulsory and its production does not require the person asserting the privilege "to restate, repeat or affirm the truth of [its] contents * * *" (*Fisher*, 425 U.S. at 409). See also *Andresen*, 427 U.S. at 477 ("the statements seized were voluntarily committed to paper before the police arrived to search for them"); *In re Grand Jury Empanelled (Mankovitz)*, 603 F.2d 469, 476-477 (3d Cir. 1979); *In re Grand Jury Empanelled (Colucci)*, 597 F.2d 851, 860-861 & n.24 (3d Cir. 1979); *United States* v. *Osborn*, 561 F.2d 1334, 1339 (9th Cir. 1977).

C. In holding that the contents of respondent's business records were privileged under the Fifth Amendment, the court below relied (Pet. App. 11a n.7; see also *id.* at 8a, 13a-14a) upon a "protection-of-private-papers principle" derived from this Court's decision nearly a century ago in *Boyd* v. *United States*, 116 U.S. 616 (1886). As this Court has pointed out, however, *Boyd* was built upon legal foundations that have long since been obliterated

(*Fisher*, 425 U.S. at 408-409), and if *Boyd* ever embodied a "protection-of-private-papers principle," that principle has no place in modern Fifth Amendment jurisprudence.

In *Boyd*, a partnership was believed to have fraudently evaded paying the tariff on imported plate glass. The penalty for this offense was forfeiture of the imported goods, and therefore the government seized the glass and instituted forfeiture proceedings. Pursuant to statute, the district court ordered production of invoices that the government alleged would establish fraudulent nonpayment of duties. This same statute provided that failure to comply with such an order would be treated as an admission of the government's allegations. The partners complied under protest, and judgment of forfeiture was entered. 116 U.S. at 616-618.

This Court reversed, holding that the order and statute violated the Fourth and Fifth Amendments. The opinion began by stating that the order requiring production of the invoices constituted a search and seizure within the meaning of the Fourth Amendment "because it is a material ingredient, and effects the sole object and purpose of search and seizure" (116 U.S. at 622). Turning to the question whether this search and seizure was "unreasonable," the opinion looked to the common law to determine whether a search for the invoices would have constituted a trespass (*id.* at 622-633). Relying principally upon the English case of *Entick* v. *Carrington*, 19 How. St. Tr. 1029 [C.P. 1765], it concluded that a search and seizure were unreasonable unless the government's title to the items seized was superior to that of the person from whom they were taken. Thus, the government could search for and seize stolen property, since the possessor did not have title (116 U.S. at 624). Likewise, the government could search for and seize goods on which duty was owed, because "the government has an interest in them for the payment of the duties thereon" (*ibid.*). But the government could not search for and seize mere evidence because property law did not give the government title to such items (*id.* at 624-633).

Having concluded that the order compelling production of the invoices had violated the Fourth Amendment, the Court still faced the question whether their admission in the forfeiture proceeding had been erroneous, since the exclusionary rule for Fourth Amendment violations would not be adopted until 31 years later in *Weeks* v. *United States*, 232 U.S. 383 (1914). Noting (116 U.S. at 633) "the intimate relation[ship] between" the Fourth and Fifth Amendments, the Court held that the admission into evidence of books and papers obtained in violation of the Fourth Amendment constituted a violation of the Fifth Amendment. It stated (116 U.S. at 633): "[W]e have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself."

What is perhaps most remarkable about *Boyd* is how little of its reasoning has stood the test of time. As the Court noted in *Fisher*, although the *Boyd* rule that "a person may not be forced to produce his private papers has * * * often appeared as dictum in later opinions of this Court" (425 U.S. at 408), the foundations for the rule "have been washed away" (*id.* at 409). Today it is well established (a) that a partnership such as the Boyd firm may not resist production of its records on Fifth Amendment grounds (*Bellis* v. *United States*, 417 U.S. 85 (1974)); (b) that an order compelling production of invoices is not a search or seizure because there can be no reasonable expectation of privacy in such documents, which are knowingly exposed to the public (see *United States* v. *Miller*, 425 U.S. 435, 440-443 (1976); *Katz* v. *United States*, 389 U.S. 347, 351-352 (1967)); (c) that, even assuming such an order constituted a search and seizure, the Fourth Amendment permits the seizure of "mere evidence" (*Warden* v. *Hayden*, 387 U.S. 294 (1967)); (d) that, again assuming that such an order was a search and seizure, the Fifth Amendment was not violated because no testimonial communication was compelled (*Andresen* v. *Maryland*, *supra*); and (e) that the

introduction of evidence obtained in violation of the Fourth Amendment does not violate the Fifth Amendment (see, *e.g.*, *United States* v. *Calandra*, 414 U.S. 338, 348 (1974)). "In consequence," the Court observed in *Fisher* (425 U.S. at 409) "the prohibition against forcing the production of private papers has long been a rule searching for a rationale consistent with the proscriptions of the Fifth Amendment against compelling a person to give 'testimony' that incriminates him."

We recognize that at the conclusion of its opinion in *Fisher* this Court stated (425 U.S. at 414):

> Whether the Fifth Amendment would shield the taxpayer from producing his own tax records in his possession is a question not involved here; for the papers demanded here are not his 'private papers,' see *Boyd* v. *United States*, 116 U.S. at 634-635.

Although *Fisher* thus refrained from expressly deciding the question presented by this case, its reasoning indisputably reflected disapproval of the view expressed in *Boyd* that the *contents* of an individual's papers are protected from compulsory production by the Fifth Amendment. Indeed, the court below acknowledged as much, stating that "[b]efore *Fisher* * * * the prevailing rule was that 'the Fifth Amendment privilege against compulsory self-incrimination protects an individual from compelled production of his personal papers and effects as well as compelled oral testimony'" (Pet. App. 8a; citation omitted), but that "[i]n *Fisher* the majority seemingly diverged from these precedents * * *" (*id.* at 9a). See also *United States* v. *Namer*, *supra*, 680 F.2d at 1092 & n.8; *In re Grand Jury Proceedings (Martinez)* *supra*, 626 F.2d at 1055; *United States* v. *Bray*, *supra*, 546 F.2d at 855 (*Boyd* "laid to rest" by *Fisher*). Nevertheless, the court below brushed off this Court's "divergence" in *Fisher* and stated that it "continued to recognize *Boyd's* protection-of-private-papers principle (Pet. App. 11a n.7).

As our previous discussion makes clear, however, the decision in *Boyd* was not based upon a "protection-of-

private-papers principle.[8] *Boyd* did not rest upon the special status of books and records as opposed to other forms of property but upon the fact that the government did not have superior title to and consequently could not seize mere evidence.[8] As this Court stated in *Gouled* v. *United States*, 255 U.S. 298, 309 (1921) (emphasis added), which reaffirmed *Boyd* and applied it to a traditional search and seizure conducted pursuant to a facially valid warrant:

> *There is no special sanctity in papers, as distinguished from other forms of property*, to render them immune from search and seizure, if only they fall within the scope of the principles of the cases in which other property may be seized, and if they be adequately described in the affidavit and warrant. Stolen or forged papers have been so seized, * * * and lottery tickets, under a statute prohibiting their possession with intent to sell them * * * and we cannot doubt that contracts may be so used as instruments or agencies for perpetrating frauds upon the Government as to give the public an interest in them which would justify the search for and seizure of them, under a properly issued search warrant, for the purpose of preventing further frauds.

During the era when *Boyd* held sway, seizures of incriminating papers were consistently upheld in cases such as *Marron* v. *United States*, 275 U.S. 192 (1927); *United States* v. *Lefkowitz*, 285 U.S. 452, 465-466 (1932); and *Abel* v. *United States*, 362 U.S. 217, 238 (1960), subject

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[8] Dictum in *Boyd* is frequently cited (see, *e.g.*, Pet. App. 8a) in an attempt to show that private papers are entitled to special Fifth Amendment protection. But the real meaning of this dictum was simply that the owner's title to these goods was superior to the government's. This is the point the Court was making when, after observing that property rights are " 'sacred and incommunicable in all instances where [they have] not been taken away or abridged by some public law for the good of the whole,' " it wrote (116 U.S. at 627-628 (emphasis added), quoting *Entick* v. *Carrington, supra*): " 'Papers are the owner's *goods and chattels*; they are his dearest *property* * * *.' "

only to the then-prevailing requirement that the papers constitute instrumentalities of crime rather than "mere evidence." All these cases refute the notion that *Boyd* conferred special status upon papers either for Fourth or Fifth Amendment purposes.

D. In attempting to distinguish *Fisher*, the court below relied upon the fact that the documents at issue in that case were neither written nor owned by those asserting the privilege (Pet. App. 10a, 11a n.7). See also *United States* v. *Miller*, 660 F.2d 563, 567 (5th Cir. 1981); *United States* v. *Davis*, 636 F.2d 1028, 1043 (5th Cir.), cert. denied, 454 U.S. 862 (1981). Conceivably these factors may have some bearing upon the question whether the *act of producing* subpoenaed documents is sufficiently testimonial to invoke Fifth Amendment protection, but we fail to see what relevance these factors can possibly have with respect to whether the documents' *contents* are privileged. *Fisher* is based upon the principle that the Fifth Amendment prohibits the government from compelling an individual to make a self-incriminating statement. When preexisting records are sought by subpoena, the person upon whom the subpoena is served is not compelled to affirm the truth of the records' contents—and this is true whether or not that person is the author or owner of the papers.

Indeed, the opinion in *Fisher* leaves no doubt that a person may not resist a subpoena or summons on Fifth Amendment grounds simply because he prepared or wrote the incriminating papers sought. The Court there stated (425 U.S. at 410; emphasis added): "The taxpayer cannot avoid compliance with the subpoena merely by asserting that the item of evidence which he is required to produce contains incriminating writing, whether his own or that of someone else." The Court added (*id.* at 410 n.11): "The fact that the documents may have been written by the person asserting the privilege is insufficient to trigger the privilege."

Moreover, it is apparent that many of the documents sought by the subpoenas in this case—such as telephone

toll records, bank statements, and bank deposit tickets—were prepared by persons other than respondent. The court of appeals itself conceded (Pet. App. 16a) that "certainly not all * * * of the subpoenaed records * * * were prepared by [respondent]." Thus, even if authorship of the documents had some bearing upon the privileged status of their contents, that factor could not justify the court of appeals' decision.

As for ownership, while the *Fisher* Court assumed that the taxpayers did not have title to the accountants' workpapers, the taxpayers undoubtedly paid to have those papers prepared, and they readily obtained possession of the papers from their accountants after learning of the IRS investigation. Thus, if ownership of the papers had been the determinative fact in *Fisher*, the result in that case would have been different if the taxpayers had purchased the papers from their accountants for nominal consideration or if the accountants had relinquished possession with donative intent. We do not believe that the decision in *Fisher* was based upon any such fine distinctions of property law totally divorced from the policy of the Fifth Amendment. To read *Fisher* in that way would mark a return to the discredited reasoning of *Boyd*, under which the extent of the protection afforded by the Fifth Amendment depended upon the common law of property and trespass. As the Ninth Circuit stated in rejecting a similar interpretation of *Fisher* (*In re Fred R. Witte Center Glass No. 3*, 544 F.2d 1026, 1028 (1976) (emphasis in original)):

> We read *Fisher* as resting on a broader principle. It permits compulsion by way of a summons or subpoena to produce documents when their *production* does not "ordinarily compel the taxpayer to restate, repeat or affirm the truth of the content of the documents sought." Mere ownership of an accountant's work papers does not convert the production of such papers into an affirmation of the truth of their contents.

The effect and clear intent of the court of appeals' decision is to make *Fisher* a very narrow exception to *Boyd*'s "prohibition against forcing the production of private papers." *Fisher*, 425 U.S. at 409. Under the court's approach, the bankrupt *Boyd* rule remains fully in effect, except presumably in cases involving the same peculiar factual situation as *Fisher*, *i.e.*, where the papers sought were not written or prepared and are not owned by the person upon whom the subpoena is served. That situation will arise relatively infrequently and can be easily avoided simply by transferring title to the documents. Accordingly, the court of appeals' decision necessarily drains *Fisher* of much of its precedential significance and replaces it with a rule based upon nothing more than the facts of the *Boyd* case and dictum taken out of context from a 200-year-old English decision concerning common law trespass.

E. The decision below granting privileged status to the documents of a sole proprietorship is not only inconsistent with settled principles of Fifth Amendment law as discussed in *Fisher*, but it is at odds with a line of pre-*Fisher* decisions holding that the records of incorporated and unincorporated organizations are not protected by the Fifth Amendment. In *Hale* v. *Henkel*, 201 U.S. 43 (1906), the Court held that a corporate officer may not withhold testimony or documents on the ground that his corporation would be incriminated. Subsequently, the Court extended this holding to require the custodian of corporate books and records to produce them pursuant to a subpoena even though he personally might be incriminated by their production. *Essgee Co.* v. *United States*, 262 U.S. 151 (1923); *Wilson* v. *United States*, 221 U.S. 361 (1911). In time, the Court likewise held that the Fifth Amendment privilege may not be asserted when the records of a labor union (*United States* v. *White*, 322 U.S. 694 (1944)), political party (*Rogers* v. *United States*, 340 U.S. 367 (1951)), or business partnership (*Bellis* v. *United States*, *supra*) are sought.

We submit that there is no substantial basis for treating the records of corporations, partnerships, or other types of organizations differently from the records of sole proprietorships. When a subpoena is issued for preexisting business records, there is no more testimonial compulsion on the sole proprietor than there is on the corporate officer or partner and no greater hazard of personal incrimination.

The difference between a corporation and a sole proprietorship is often nothing more than a legal formality and does not reflect the size, structure, activities, or longevity of the business. A sole proprietorship may, for example, consist of a chain of retail stores employing numerous persons and doing millions of dollars in business annually, while a corporation may consist of nothing more than a single store operated by the corporation's sole stockholder. See *Wild* v. *Brewer*, 329 F.2d 924 (9th Cir. 1964) (the sole stockholder of a corporation held not entitled to assert privilege with respect to corporate records). In recent years, moreover, thousands of physicians, lawyers, dentists, and other professionals have incorporated, principally for tax purposes. It would be anomalous indeed if the contents of the records maintained by such persons enjoyed no Fifth Amendment protection, while those of their colleagues who continued to practice as sole proprietors remained fully protected. See *United States* v. *Radetsky*, 535 F.2d 556, 568-569 (10th Cir. 1976) (doctor held not entitled to assert privilege with respect to records of professional corporation consisting of two doctors). Similarly, there is no reason why the decision to take a partner should have such a profound effect for Fifth Amendment purposes. See *Bellis* v. *United States*, *supra* (attorney held not entitled to assert privilege with respect to records of three-partner law firm).

The court below offered no principled defense of the distinction it drew between a sole proprietorship and other forms of business organization. Indeed, it stated that the distinction was "irrational" (Pet. App. 6a n.3, quoting *Martinez*, 626 F.2d at 1056), and that treating all busi-

ness organizations in the same way for Fifth Amendment purposes had "considerable analytic appeal." Nevertheless, the court felt compelled to reach the result it did because of dictum in *Bellis*, 417 U.S. at 87-88, to the effect that the Fifth Amendment privilege immunizes the business records of a sole proprietor (Pet. App. 6a-8a). That dictum, however, was expressly based on the *Boyd* interpretation of the privilege that was subsequently disavowed in *Fisher*.[9]

Respondent seeks to defend the "irrational" distinction between the scope of protection afforded the records of corporations and partnerships, on the one hand, and sole proprietorships, on the other, on the ground that it reflects the difference between an individual and an artificial entity or collective group (see Br. in Opp. 9). However, respondent's argument is untenable because the corporate officer or partner who may be compelled to produce documents that incriminate *him* is not an artificial entity or a collective group. To be sure, one of the stated bases for the rule that the privilege cannot be employed by an individual to avoid production of corporate or partnership records is that such records are held in a representative and not in an individual capacity. See, *e.g.*, *Bellis*, 417 U.S. at 89. But that is not the primary basis for the rule, as is demonstrated by *Grant* v. *United States*, 227 U.S. 74 (1913), which held that the privilege

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[9] *Bellis* stated (417 U.S. at 87-88):

> It has long been established, of course, that the Fifth Amendment privilege against compulsory self-incrimination protects an individual from compelled production of his personal papers and effects as well as compelled oral testimony. In *Boyd* v. *United States*, 116 U.S. 616 (1886), we held that "any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime" would violate the Fifth Amendment privilege. *Id.*, at 630; see also *id.*, at 633-635 * * *. The privilege applies to the business records of the sole proprietor or sole practitioner as well as to personal documents containing more intimate information about the individual's private life. *Boyd* v. *United States*, *supra* * * *.

is inapplicable even where the corporation is defunct and title to its records has passed to its sole stockholder. See also *Bellis*, 417 U.S. at 96 n.3; *Wheeler* v. *United States*, 226 U.S. 478 (1913); *United States* v. *Hankins*, 565 F.2d 1344, 1349 (5th Cir. 1978), cert. denied, 440 U.S. 909 (1979). Rather, this Court enunciated the primary basis for the rule when it stated in *United States* v. *White*, *supra*, 322 U.S. at 700 (citations omitted):

> The scope and nature of the economic activities of incorporated and unincorporated organizations and their representatives demand that the constitutional power of the federal and state governments to regulate those activities be correspondingly effective. The greater portion of evidence of wrongdoing by an organization or its representatives is usually to be found in the official records and documents of that organization. Were the cloak of the privilege to be thrown around these impersonal records and documents, effective enforcement of many federal and state laws would be impossible. The framers of the constitutional guarantee against compulsory self-disclosure, who were interested primarily in protecting individual civil liberties, cannot be said to have intended the privilege to be available to protect economic or other interests of such organizations so as to nullify appropriate government regulations.[10]

The particular form a business assumes says nothing about "[t]he scope and nature of its economic activities." Accordingly, when the economic activities of a business entity are the focus of investigation, as is true in this case, the availability of the privilege should not depend on the technical form of the business's organization. See

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[10] See 8 J. Wigmore, *supra*, § 2259b, at 360 ("The reason why the privilege is not available to the custodian [of records of a collective group] is that * * * [g]roups frequently are powerful and their illegal doings frequently are provable only by their records; and, since economic crimes (as contrasted with common law crimes) are usually not even *discoverable* without access to business records, a rule which privileged the production of such records whenever they incriminated the custodian would result in many (rather than few) of the violators going free").

In re Witness Before the Grand Jury, 546 F.2d 825, 827 (9th Cir. 1976).

F. Insofar as it rests upon the conclusion that revelation of the contents of documents is itself shielded by the cloak of the Fifth Amendment privilege, the decision below creates a further anomaly. Its result is that the contents of a sole proprietorship's records are privileged when sought by subpoena, but those same records may be seized and their contents may be examined by police executing a valid warrant. *Fisher*'s application with respect to the seizure of documents was clarified in *Andresen*, which held that the seizure of business records and their introduction into evidence at trial does not violate the Fifth Amendment. Rejecting the contention that the contents of such records are protected by the privilege, the Court stated succinctly (427 U.S. at 473):

> [P]etitioner was not asked to say or to do anything. The records seized contained statements that petitioner had voluntarily committed to writing.

The Court then explained (*ibid.*) that Andresen had neither turned over nor authenticated the records and thus had not been compelled to incriminate himself by performing either of those acts.

Andresen thus plainly stands for the proposition that the contents of preexisting business records are not privileged—as Justice Brennan expressly acknowledged in his dissent (see 427 U.S. at 486)—and that such records may be obtained by subpoena unless the act of production constitutes testimonial self-incrimination. We of course recognize that the production of a document pursuant to subpoena involves an element of compulsion that the seizure of the same document pursuant to search warrant does not. But that distinction is irrelevant to the question whether the *contents* of the document are privileged. Whether preexisting documents are obtained by subpoena or by warrant, creation of those documents was not compelled, and therefore their contents are not privileged under the Fifth Amendment.

The illogic of the result produced by the decision below was recognized by the Fifth Circuit in *United States* v.

Davis, *supra*, 636 F.2d at 1042: "It is difficult to find a logical reason for applying the *Boyd* principle to subpoenaed documents and not documents taken in a search, as in *Andresen*." See also *Andresen*, 427 U.S. at 485, 486 (Brennan, J., dissenting); *Martinez*, 626 F.2d at 1056. Nevertheless, the Fifth Circuit concluded in *Davis* (636 F.2d at 1042) that, "[h]owever illogically," its own prior opinions "limit *Andresen* to documents taken in a search." But see, *e.g.*, *United States* v. *Namer*, *supra*, 680 F.2d at 1092 & n.8.

Not only is the different treatment given seized and subpoenaed documents illogical, but, if accepted by this Court, it will have an untoward effect upon privacy by "prevent[ing] the lesser intrusion of subpoena while permitting the greater intrusion of search and seizure" (*Martinez*, 626 F.2d at 1056). A search is more intrusive on privacy interests than a subpoena because it almost inevitably entails disclosure to official view of matters in the home or place of business beyond those specifically subject to seizure. This concern is heightened in the case of document searches, because of the relatively broad character that such a search must often assume; thus, this Court has recognized that a search and seizure of a person's papers presents "grave dangers" not present in a search for physical objects, because in searches for papers "it is certain that some innocuous documents will be examined, at least cursorily, in order to determine whether they are, in fact, among those papers authorized to be seized." *Andresen*, 427 U.S. at 482 n.11. See also *National City Trading Corp.* v. *United States*, 635 F.2d 1020, 1024 (2d Cir. 1980).[11] Although the subject of a search warrant can seek the return of papers alleged to have been improperly seized, he is then in the position of

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[11] Of course, investigators are free to proceed by search rather than subpoena if they possess probable cause and can secure an adequately particularized warrant. *Zurcher* v. *Stanford Daily*, 436 U.S. 547 (1978). The point here is simply that, where a subpoena would suffice, it makes little sense from the standpoint of protecting private interest to adopt rules that needlessly encourage the use of searches.

"one attempting to close the barn door after the horses have escaped." *United States* v. *Abrams*, 615 F.2d 541, 549 n.2 (1st Cir. 1980). By contrast, although a subpoena too can be overbroad, the party whose papers are being sought is in a position to seek judicial narrowing of the subpoena or a protective order *prior* to compliance. See Fed. R. Crim. P. 17(c); *United States* v. *Abrams*, *supra*, 615 F.2d at 549 n.2. In short, the likely effect of the disparate treatment of seized and subpoenaed documents endorsed by the court of appeals will be to encourage the use of search warrants and to discourage the use of subpoenas, even though the latter are plainly far less intrusive.

G. Under the logic of *Fisher*, reaffirmed in *Andresen*, the contents of even the most personal papers would not appear to be privileged under the Fifth Amendment. *See United States* v. *Nobles*, 422 U.S. 225, 233 n.7 (1975). Nevertheless, the accountant's workpapers in *Fisher* were clearly business papers (see *ICC* v. *Gould*, 629 F.2d 847, 859 n.22 (3d Cir. 1980)), and the Court there stated that neither the "[s]pecial problems of privacy which might be presented by subpoena of a personal diary" nor "First Amendment values" were at issue (425 F.2d at 401 n.7). Similarly, in *Andresen*, the Court was careful to limit its holding to searches and seizures of "business records" (427 U.S. at 465, 475, 477). And the courts of appeals have repeatedly read *Fisher* to apply only to business documents. See *United States* v. *Namer*, *supra*, 680 F.2d at 1092 & n.8; *ICC* v. *Gould*, *supra*, 629 F.2d at 859 n.22; *United States* v. *Doe*, *supra*, 628 F.2d at 695; *Martinez*, 626 F.2d at 1054-1055 & n.2; *United States* v. *Abrams*, *supra*, 615 F.2d at 547; *United States* v. *Helina*, 549 F.2d 713, 716 n.3 (9th Cir. 1977). But see *United States* v. *Davis*, *supra*, 636 F.2d at 1042. For example, in holding that the Fifth Amendment does not apply to the contents of the business records of a sole proprietor, the First Circuit emphasized (*Martinez*, 626 F.2d at 1054 n.2) that

> this case does not involve subpoena of papers more intimate or personal than business records. The ap-

> plicability of *Fisher* v. *United States* to non-business, intimate personal papers such as private diaries or drafts of letters or essays is an open question. See *id.* at 401 n.7 * * *. There may be additional sources of protection, such as the First Amendment or the personal autonomy component of the due process clause of the Fourteenth Amendment, which direct that the Fifth Amendment apply to the contents of such writings.

The present case too involves business records of the type that are generally kept in the ordinary course of business, not personal papers such as diaries or personal correspondence. As Justice Brennan noted in his concurrence in *Fisher*, 425 U.S. at 425-426, business records do not touch upon "the more intimate aspects of one's life." See also *Andresen*, 427 U.S. at 486 (Brennan, J., dissenting). In Judge Friendly's words: "The writings typically sought to be produced [by subpoena] are not the outpourings of an individual's soul, for which the first amendment protection against subpoena may be in order, but rather the books and records of an enterprise that is criminal or has been unlawfully conducted." Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. Cinn. L. Rev. 671, 703 (1968). Thus, to the extent that *Fisher* and *Andresen* left open the issue whether personal diaries and letters may be subpoenaed or seized by the government, that issue is not presented in this case either. The sort of documents involved here—such as vouchers, paid bills, and bank statements (Pet. App. 33a)—are not "the outpourings of an individual's soul." [12]

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[12] Although the issue thus need not be reached here, it is our view that it would be unjustified to extend the Fifth Amendment privilege beyond its traditional role of protecting against compelled testimonial disclosures, in order to serve privacy interests associated with particular types of documents. In the first place, as we previously noted (page 27 note 11, *supra*), the privacy-protection component thereby injected into Fifth Amendment analysis is entirely incompatible with the settled principle that disclosure can be

II. Any Testimonial Self-Incrimination Inherent In The Act Of Producing Standard Categories Of Business Records Held By A Sole Proprietorship Is Cured By Prohibiting The Introduction In Subsequent Proceedings Of Proof Of The Act Of Production

While this Court in *Fisher* indicated that the contents of preexisting documents are not privileged under the Fifth Amendment, it did acknowledge (425 U.S. at 410) that

> the act of producing evidence in response to a subpoena nevertheless has communicative aspects of its own, wholly aside from the contents of the papers produced. Compliance with the subpoena tacitly concedes the existence of the papers demanded and their possession or control by the taxpayer. It also would indicate the taxpayer's belief that the papers are those described in the subpoena. *Curcio* v. *United States*, 354 U.S. 118, 125 (1957). The elements of compulsion are clearly present, but the more difficult issues are whether the tacit averments of the taxpayer are both "testimonial" and "incriminating" for purposes of applying the Fifth Amendment.

In *Fisher*, the Court did not attempt to provide a "categorical" answer to these questions but instead held that the act of producing the records sought in that case did

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compelled through an adequate grant of immunity. Beyond that, use of the Fifth Amendment privilege for this purpose is probably unnecessary. Certainly it is not immediately apparent why unreasonable and unjustified official examination of intimately private documents cannot be adequately controlled through application of First and Fourth Amendment principles, which after all embody the relevant policies. For example, it may be appropriate to require an exceptionally high showing of need before government officials may reasonably be permitted to examine the contents of a personal diary, as a matter of Fourth Amendment law; but it makes absolutely no sense, in terms of privacy protection concerns, to make the right to read the diary turn upon whether it is found during a lawful search of an automobile or produced pursuant to a subpoena.

not amount to testimonial self-incrimination (425 U.S. at 410-411). Similarly, in this and the vast majority of cases involving subpoenas for the standard business records of sole proprietorships, we believe that the act of production does not rise to the level of testimonial self-incrimination. More important, it seems perfectly clear that any testimonial self-incrimination inherent in the act of production is at most slight; that in virtually every case, the sole objective of the subpoena is to obtain access to the contents of the documents, which are not privileged; and that when compliance with such subpoenas is resisted on Fifth Amendment grounds the witness's motive for resisting the subpoena is likewise almost invariably based upon the documents' contents. See *Doe*, 626 F.2d at 1056. Under these circumstances, it makes little sense to prevent the grand jury from examining the records' contents because of the largely theoretical possibility that the act of production might be used to incriminate the person upon whom the subpoena is served. Instead, any basis for Fifth Amendment objection in cases of this sort may be removed by a rule prohibiting the use in any subsequent criminal proceedings of proof of the act of production against the witness who has asserted his privilege at the subpoena stage.

A. *The Act of Producing Standard Categories of Business Records Held by a Sole Proprietorship Generally Does Not Constitute Testimonial Self-Incrimination*

As previously noted, the act of producing documents might be considered testimonial in two ways: it may concede the existence and possession of the papers sought and it may indicate a belief that the papers produced are those described in the subpoena.

1. It seems clear that admitting the existence and possession of standard business records rarely could amount to testimonial self-incrimination within the protection of the Fifth Amendment. In *Fisher*, after noting that the papers at issue were "the kind usually prepared by an accountant working on the tax returns of his

client," the Court concluded (425 U.S. at 411; citation omitted):

> The existence and location of the papers are a foregone conclusion and the taxpayer adds little or nothing to the sum total of the Government's information by conceding that he in fact has the papers. Under these circumstances by enforcement of the summons "no constitutional rights are touched. * * *"

This reasoning applies equally to most if not all of the documents sought by the subpoenas in this case, such as general ledgers, vouchers, paid bills, and invoices. Such documents are kept by virtually every business, from the smallest family concern to the largest conglomerate, and therefore conceding their existence, possession, and control "adds little or nothing to the sum total of the Government's information" (*ibid.*). As the court of appeals stated in *Martinez*, 626 F.2d at 1055, the facts admitted by honoring such a subpoena "in most cases will be so trivial that the Constitution is not implicated." See also, *e.g.*, *United States* v. *Davis*, *supra*, 636 F.2d at 1041; *United States* v. *Praetorius*, 622 F.2d 1054, 1063 (2d Cir. 1979), cert. denied, 449 U.S. 860 (1980); *United States* v. *Authement*, 607 F.2d 1129, 1132 (5th Cir. 1979); *United States v. Osborn*, *supra*, 561 F.2d at 1339.

An individual claiming the Fifth Amendment privilege must be "confronted by substantial and 'real,' and not merely trifling or imaginary, hazards of incrimination." *Marchetti* v. *United States*, 390 U.S. 39, 53 (1968); see also, *e.g.*, *Hoffman* v. *United States*, 341 U.S. 479, 486 (1951) (Fifth Amendment "protection must be confined to instances where the witness has reasonable cause to apprehend danger"); *Rogers* v. *United States*, 340 U.S. 367, 373 (1951) ("real danger of legal detriment"); *Mason* v. *United States*, 244 U.S. 362, 365 (1917) (must be "real danger" and not just "remote possibilities out of the ordinary course of law"). While their contents may be inculpatory, the mere admission of possession and control of standard business records does not itself pose such a substantial, realistic threat.

2. As noted, the act of producing documents might also be considered testimonial insofar as it authenticates them. But where standard business records are sought, the possibility that tacit authentication would amount to testimonial self-incrimination is slight at best and is frequently nonexistent.

In order to understand the scope of protection furnished in this context by the Fifth Amendment privilege, it is necessary to keep in mind precisely what is meant when it is said that production of documents may "authenticate" them. Authentication is a narrow, technical requirement for the admissibility of evidence at trial.[13] See E. Cleary, *McCormick on Evidence* § 218, at 543-545 (1972 ed). Evidence presented to a grand jury need not be authenticated (see Fed. R. Evid. 101, 1101(d)(2); *United States* v. *Calandra*, 414 U.S. 338, 345 (1974); *Costello* v. *United States*, 350 U.S. 359 (1956)), and therefore any "authentication" inherent in the production of documents in response to a grand jury subpoena cannot be said to incriminate an individual with respect to such proceedings.

Under the Federal Rules of Evidence, authentication is a "condition precedent to admissibility" that must be "satisfied by evidence sufficient to support a finding that

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[13] The traditional requirement of authentication has been strongly criticized by commentators. See, *e.g.*, Broun, *Authentication and Contents of Writings (Law and the Social Order)*, 1969 Ariz. St. L. J. 611, 624-634; Erich, *Unnecessary Difficulties of Proof*, 32 Yale L.J. 436, 441-445 (1923); Levin, *Authentication and Content of Writings*, 10 Rutgers L. Rev. 632, 634-641 (1955-1956); E. Cleary, *McCormick on Evidence*, § 218, at 545 (2d ed. 1972); Strong, *Liberalizing the Authentication of Private Writings*, 52 Cornell L. Rev. 284 (1967). The modern trend has been to liberalize the requirement, if not to dispense with it entirely. For example, the provisions of the Federal Rules of Evidence dealing with authentication have been described as going "as far toward generalizing the principle of self-incrimination as would be possible without abandoning altogether the basic premise that some sort of authenticating proof should be required." 5 D. Louisell & C. Mueller, *Federal Evidence* § 505, at 12 (1981).

the matter in question is what its proponent claims." Fed. R. Evid. 901(a). While testimony that a sole proprietor produced certain papers in response to a subpoena for his business records would ordinarily suffice for authentication, in the vast majority of cases such records could also be authenticated in several other ways. Many business documents maintained by a sole proprietorship are written by persons other than the owner—such as his employees and persons with whom he does business—and could therefore be authenticated by the author's testimony.[14] If the author cannot or will not testify, authentication may be accomplished through the testimony of another person who witnessed the document being written or who received, typed, delivered, mailed, filed, read, or otherwise acquired familiarity with it.[15] A sole proprietorship's business ledgers and journals can be authenticated by any employee, former employee, or other individual who made entries or saw entries being made;[16] such documents and other business records may also be authenticated by a person who merely had supervisory authority over or is familiar with the company's record-keeping procedures.[17] Even documents prepared exclusively by the

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[14] *United States* v. *Gipson*, 609 F.2d 893, 894-895 (8th Cir. 1979); 5 D. Louisell & C. Mueller, *supra* note 13, § 507, at 27; E. Cleary, *supra* note 13, § 220, at 545; 5 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 901(b)(1)[01], at 901-21 to 901-22 (1982); 7 J. Wigmore, *Evidence* § 2131, at 712 & n.2 (Chadbourn rev. 1978).

[15] *In re Clifford*, 566 F.2d 1023, 1025 (5th Cir. 1978) (witnessed signing); *McGuire* v. *Davis*, 437 F.2d 570, 573 (5th Cir. 1971) (received); 5 D. Louisell & C. Mueller, *supra* note 13, § 507, at 27; E. Cleary, *supra* note 13, § 219, at 545; 5 J. Weinstein & M. Berger, *supra* note 14, ¶ 901(b)(1)[01], at 901-20.

[16] See *United States* v. *Helberg*, 565 F.2d 993, 997 (8th Cir. 1977); E. Cleary, *supra* note 13, § 219, at 545 & n.12.

[17] See, *e.g.*, *United States* v. *Smith*, 609 F.2d 1294, 1301-1302 (9th Cir. 1979) (witness familiar with record-keeping procedures); *United States* v. *Ullrich*, 580 F.2d 765, 771-772 (5th Cir. 1978) (witness familiar with record-keeping procedures); *United States*

sole proprietor, kept by him in a private file, and never seen by any other person may be authenticated by expert or nonexpert testimony concerning the genuineness of the sole proprietor's handwriting (Fed. R. Evid. 901(b)(3));[18] indeed, the trier of fact may draw its own conclusion about authenticity after comparing the documents with a specimen of the sole proprietor's handwriting (*ibid.*). Documents may even be authenticated based upon their "appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances" (Fed. R. Evid. 901(b)(4)).[19] This rule has been construed to permit the authentication of a business's correspondence based upon its letterhead.[20] Authentication may also be based upon distinctive language patterns evident in a document,[21] and "a coincidence or 'match' between content and a course of events

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v. *Evans*, 572 F.2d 455, 490 (5th Cir. 1978) (witnesses had used records and were familiar with record-keeping procedures); *United States* v. *Colyer*, 571 F.2d 941, 947 (5th Cir. 1978) (familiarity), cert. denied, 439 U.S. 933 (1978); *United States* v. *Reese*, 568 F.2d 1246, 1252 (6th Cir. 1977) (familiarity); *United States* v. *Page*, 544 F.2d 982, 987 (8th Cir. 1976) (familiarity); *Peter Eckrich & Sons, Inc.* v. *Selected Meat Co.*, 512 F.2d 1158; 1159 (7th Cir. 1975) (supervisory authority); 4 D. Louisell & C. Mueller, *supra* note 13, § 446, at 662-667; E. Cleary, *supra* note 13, § 219, at 545.

[18] See *Andresen*, 427 U.S. at 473 (authentication by expert); *United States* v. *Dreitzler*, 577 F.2d 539, 553 n.24 (9th Cir. 1978) (authentication by former secretary), cert. denied, 440 U.S. 921 (1979); *United States* v. *Kilgore*, 518 F.2d 496, 498 (5th Cir. 1975) (authentication by assistant based on initials), cert. denied, 425 U.S. 950 (1976) and 430 U.S. 905 (1977).

[19] See, *e.g.*, *United States* v. *Luschen*, 614 F.2d 1164, 1174 (8th Cir.), cert. denied, 446 U.S. 939 (1980); *United States* v. *Goichman*, 547 F.2d 778, 782-784 (3d Cir. 1976); 5 D. Louisell & C. Mueller, *supra* note 13, § 515, at 78; 5 J. Weinstein & M. Berger, *supra* note 14, ¶ 901(b)(4)[01]-901(b)(4)[04], at 901-46 to 901-58.

[20] See *United States* v. *Gordon*, 634 F.2d 639, 643-644 (1st Cir. 1980); 5 D. Louisell & C. Mueller, *supra* note 13, § 512, at 57-58 (same rule should apply to printed business forms); 5 J. Weinstein & M. Berger, *supra* note 14, ¶ 901(b)(4)[02], at 901-53 to 901-54.

[21] See Fed. R. Evid. 901(b), advisory committee note.

or behavior, as established by other evidence, sometimes serves as circumstantial evidence of authentication." [22]

A witness need not be absolutely certain of his testimony in order to authenticate evidence.[23] And the showing required for authentication need not be accomplished by the testimony of any single witness or by any single type of authentication evidence.[24]

In short, the difficulty of authenticating standard business records at trial is not great and infrequently proves an obstacle to admissibility.[25] It follows that the testimonial value of any authentication inherent in the act of producing documents is correspondingly small.

By the same token, such tacit authentication is unlikely to be incriminating. It is important to remember that by producing documents in response to a subpoena an individual merely indicates his belief that the documents are those described in the subpoena (*Fisher*, 425 U.S. at 412-413), and that fact is seldom incriminating. The matters disclosed by the documents may well be incriminating, but an individual who complies with a documentary subpoena does not certify the truth of their contents. Nor is such tacit authentication alone sufficient to permit the documents' admission at trial to prove the matters asserted therein.[26] Since business documents are hearsay

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[22] 5 D. Louisell & C. Mueller, *supra* note 13, § 515, at 78.

[23] See, *e.g.*, *United States* v. *Johnson*, 637 F.2d 1224, 1247-1248 (9th Cir. 1980); D. Louisell & C. Mueller, *supra* note 13, § 507, at 26; 5 J. Weinstein & M. Berger, *supra* note 14, ¶ 901(b)(1)[01], at 901-21 to 901-22.

[24] D. Louisell & C. Mueller, *supra* note 13, § 507, at 26; 5 J. Weinstein & M. Berger, *supra* note 14, ¶ 901(b)(1)[01], at 901-22.

[25] See D. Louisell & C. Mueller, *supra* note 13, § 505, at 12.

[26] Fed. R. Evid. 901(b) advisory committee note; *United States* v. *One 1968 Piper Navajo Twin Engine Aircraft*, 594 F.2d 1040, 1042 (5th Cir. 1979); *Rhoads* v. *Virginia-Florida Corp.*, 476 F.2d 82 (5th Cir. 1973).

when offered to prove the truth of their contents, they are admissible only if they fall within an exception to the hearsay rule (Fed. R. Evid. 801, 802).

The exception under which such records are usually admitted is that for regularly kept records. Rule 803(6) of the Federal Rules of Evidence, which codifies this exception, requires testimony that the records were made at or near the time of the events recorded, that they were made "by, or from information transmitted by, a person with knowledge," and that "it was the regular practice of that business * * * to make [such] record[s]." Under the plain language of this exception, the mere fact that a custodian of business records produced them in response to a subpoena is not enough.

In sum, the tacit authentication implicit in the act of producing standard business records has little if any testimonial value and is very unlikely to incriminate. The possibility of incrimination by tacit authentication is far less a reality than a fiction claimed for the purpose of preventing grand juries from seeing documents whose *contents* are incriminating but are not shielded by the Fifth Amendment. Quashing a grand jury subpoena, on the other hand, may cause great harm. "[T]he investigation of crime by the grand jury implements a fundamental governmental role of securing the safety of the person and property of the citizen * * *" (*Branzburg* v. *Hayes*, 408 U.S. 665, 700 (1972)).

> "When the grand jury is performing its investigatory function into a general problem area . . . society's interest is best served by a thorough and extensive investigation." *Wood* v. *Georgia*, 370 U.S. 375, 392 (1962). A grand jury investigation "is not fully carried out until every available clue has been run down and all witnesses examined in every proper way to find if a crime has been committed." *United States* v. *Stone*, 429 F.2d 138, 140 (C.A. 2 1970).
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Id. at 701; see also *Calandra*, 414 U.S. at 344. It would be grossly disproportionate to block a grand jury's access to unprivileged evidence that may be highly probative and important simply because of the largely theoretical possibility that the act of production might be used as incriminating authentication evidence in a subsequent trial. Quashing a subpoena in such a situation "provides the individual with a remedy far exceeding the scope of his Fifth Amendment privilege." *Martinez*, 626 F.2d at 1056.

3. While we think it clear that the act of producing standard business records does not generally rise to the level of testimonial self-incrimination, special circumstances might dictate a different conclusion. But it is up to the individual asserting the privilege to "show a realistic possibility that his answer will be used against him." *Pillsbury* v. *Conboy*, No. 81-825 (Jan. 11, 1983), slip op. 3 n.1 (Marshall, J., concurring). See also, *e.g.*, *In re Grand Jury Subpoena Duces Tecum*, 697 F.2d 277, 279 (10th Cir. 1983); *In re Grand Jury Empanelled (Markowitz)*, 603 F.2d 469, 477 (3d Cir. 1979); *United States* v. *Melchor Moreno*, 536 F.2d 1042, 1049 (5th Cir. 1976). True, the witness is not required "to prove the hazard in the sense in which a claim is usually required to be established in court," because he would thereby be "compelled to surrender the very protection which the privilege is designed to guarantee" (*Hoffman* v. *United States*, *supra*, 341 U.S. at 486). But it must be evident from the facts brought to the court's attention that furnishing the requested document would create a real and substantial threat of self-incrimination. *Ibid.*; *Marchetti* v. *United States*, *supra*, 390 U.S. at 53; *United States* v. *Reynolds*, 345 U.S. 1, 9 (1953). When no special circumstances are evident, a subpoena for standard business records should be enforced. As the Tenth Circuit wrote recently in rejecting a bare assertion of Fifth Amendment privilege similar to respondent's (*In re Grand Jury Subpoena Duces Tecum*, *supra*, 697 F.2d at 279):

> Whether the act of producing documents in response to a subpoena is both testimonial and incrimi-

nating is a difficult issue whose resolution depends "on the facts and circumstances of particular cases or classes thereof." [*Fisher*, 425 U.S.] at 411 * * *; see also *id.* at 414-30 * * * (Brennan, J., concurring). Our review of this question here is rendered impossible by the [witnesses'] failure to specify * * * the origin of each document * * *. We cannot determine to which documents the *Fisher* analysis may be applicable. We will not speculate or render what is in essence an advisory opinion.

The burden of establishing the applicability of a privilege rests on the party seeking to assert it. * * * The [witnesses'] broad declarations simply do not meet this burden.[27]

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[27] It is implicit in *Hoffman*, 341 U.S. at 486-487, that a witness who claims the Fifth Amendment privilege may not simply refuse to testify but must assert the privilege in response to particular questions. Only then can the judge determine "from the implication of the question, in the setting in which it is asked," whether an answer would be incriminating (*ibid.*). Thus, contrary to the suggestion in the opinion below (Pet. App. 18a-19a), the courts of appeals have almost uniformly held that a witness may not rest upon a blanket assertion of the Fifth Amendment privilege when called to testify in a criminal trial or grand jury proceeding. See, *e.g.*, *United States* v. *Rodriguez*, 706 F.2d 31, 37 (2d Cir. 1983); *United States* v. *Horton*, 629 F.2d 577, 579 (9th Cir. 1980); *United States* v. *Goodwin*, 625 F.2d 693, 701 (5th Cir. 1980); *United States* v. *Hodgson*, 492 F.2d 1175, 1177 (10th Cir. 1974). While this issue appears to have arisen less frequently in cases involving document subpoenas, the same rule should apply in that context. See *In re Grand Jury Subpoena Duces Tecum*, *supra*, 697 F.2d at 279.

As previously noted, an individual claiming the Fifth Amendment privilege has the burden of showing that it is properly asserted. See pages 38-39, *supra*. If a factual record is required to adjudicate the claim, an *in camera* hearing may be held. See *In re Katz*, 623 F.2d 122, 126-127 (2d Cir. 1980); *United States* v. *Goodwin*, *supra*, 625 F.2d at 701; *United States* v. *Melchor Moreno*, 536 F.2d 1042, 1049 (5th Cir. 1976); *United States* v. *Gomez-Rojax*, 507 F.2d 1213, 1220 (5th Cir.), cert. denied, 423 U.S. 226 (1975); *United States* v. *Fox*, 549 F. Supp. 1362, 1363-1364 (S.D.N.Y. 1982). Testimony at this hearing may be made inadmissible in subquent proceedings. *In re Katz*, *supra*, 623 F.2d at 127; *In re Grand Jury Empaneled (Markowitz)*, *supra*, 603 F.2d at 474-475.

4. When the principles just outlined are applied to the present case, it is apparent that the courts below erred in holding that respondent was entitled to resist production of all of the records sought by the five subpoenas.

Most, if not all, of those documents were standard business records of the type maintained by virtually every business, and their existence, location, and control in respondent's hands were thus a "foregone conclusion" (*Fisher*, 425 U.S. at 411). The court of appeals attempted to refute this argument by observing that there is "nothing in the record that would indicate that the United States knows, *as a certainty*, that each of the myriad documents demanded by the five subpoenas in fact is in [respondent's] possession or subject to his control" (Pet. App. 15a; emphasis added). However, the government seldom if ever knows "as a certainty" that subpoenaed documents exist and are subject to a witness's control. Even if the government has incontrovertible evidence that the witness had possession and control of the documents in the very recent past, the possibility will always exist that the documents were subsequently removed or destroyed. In *Fisher* itself, there was nothing to suggest that the government knew "as a certainty" when it issued the summons that the taxpayers had kept control of the papers at issue rather than transferring them to someone else or destroying them.

The court of appeals likewise erred in concluding that respondent was entitled to resist compliance with the subpoenas on the ground that the tacit authentication resulting from the act of production would automatically constitute meaningful testimonial self-incrimination. Without requiring respondent to show that tacit authentication posed a realistic threat of testimonial self-incrimination or even to make a particularized claim of privilege, the court permitted him to rest upon a blanket assertion of Fifth Amendment privilege with respect to every document sought by the subpoenas except for those required to be kept by law. The court wrote (Pet. App. 16a):

"Here * * * many (although certainly not all) of the subpoenaed records * * * most likely were prepared by [respondent]." But since respondent did not prepare and could not vouch for the accuracy of all the documents sought, the court of appeals' reasoning was directly contrary to *Fisher*, where this Court found (425 U.S. at 413) that any tacit authentication resulting from production of subpoenaed papers did not invoke Fifth Amendment protection because

> [t]he taxpayer did not prepare the papers and could not vouch for their accuracy. The documents would not be admissible in evidence against the taxpayer without authenticating testimony. Without more, responding to the subpoena in the circumstances before us would not appear to represent a substantial threat of self-incrimination.

The court of appeals also observed (Pet. App. 16a) that "[t]he record contains no explanation by the United States as to how documents [prepared by respondent] could be authenticated without [respondent's] explicit or implicit participation." But this is odd reasoning indeed: respondent may resist production of the documents on grounds of self-incrimination because the government may be *unable* to use those documents against him at any subsequent trial. Obviously the government could not tell specifically how, or if, many of the documents could be authenticated until they were turned over. And while "the record" does not contain an abstract discussion of the various methods of authenticating business documents without the assistance of their custodian (see Pet. App. 16a), available alternatives are well known (see pages 33-36, *supra*), and their likely application to the documents sought in this case is straightforward.

For example, of the 28 categories of records sought by the third subpoena issued in this case, at least 13[28] and

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[28] See page 2 note 2, *supra*, categories 6-8, 10-12, 14, 16-18, 21, 26, 28. The same is true of the telephone toll records sought by the first subpoena (see Pet. App. 26a), the bank statements, cancelled

probably 16 [29]—including vouchers, paid bills, invoices, billings, bank statements, cancelled checks, contracts, bank deposit tickets, tax returns and telephone toll records [30]—consisted of documents that were almost certainly prepared or read by other persons, and therefore those persons were potentially capable of authenticating them.[31] The various business journals listed in that subpoena [32] could be authenticated by any employee or other person who made entries, saw entries being made, used those books, had supervisory authority over them, or was familiar with the company's record-keeping procedures. And any document that could not be authenticated by one of these methods might be authenticated based upon handwriting analysis or the document's own distinctive characteristics.

Finally, the court of appeals reasoned (Pet. App. 18a) that respondent had no obligation to show that the act of producing the subpoenaed documents might incriminate him because "the Government already [had] conceded that all of the papers it seeks are potentially incriminating." However, as previously noted, the mere fact that

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checks, check stubs, and bank deposit tickets requested by the second and fifth subpoenas (see Pet. App. 30a, 36a), and at least 12 of the 25 categories of documents listed in the fourth subpoena (*i.e.*, categories 5-10, 12-13, 15-17, 25).

[29] Categories 22-24. In addition, "financial statements (third subpoena, category 15; fourth subpoena, category 14) may have been prepared by someone other than the sole proprietor and were likely sent to someone else, such as a bank or creditor. "Workpapers" (third subpoena, category 27) and a list of employees (third subpoena, category 25) would fall under the same rule if prepared or seen by someone other than the sole proprietor, such as an employee, bookkeeper, or accountant. Similarly, "[c]orrespondence and memoranda" (fourth subpoena, category 24), if sent to the sole proprietor, could be authenticated by their authors.

[30] See page 2 note 2, *supra*; Pet. App. 33a.

[31] See page 34, *supra*.

[32] Categories 1-5, 9, 19-20.

the *contents* of subpoenaed records may be incriminating does not demonstrate that the act of producing them would constitute testimonial self-incrimination.

B. *When a Documentary Subpoena Is Resisted on the Ground That the Act of Production Would Constitute Testimonial Self-Incrimination, Fifth Amendment Rights are Fully Protected and Interference With Grand Jury Investigations Is Minimized by Requiring Production but Excluding Evidence of the Act of Production in Future Proceedings*

1. As previously noted, in virtually every case where a subpoena for standard business records is resisted on the ground that the act of production would be self-incriminating, what is really of concern to both parties is disclosure of the documents' unprivileged contents. Furthermore, any testimonial self-incrimination inherent in the act of production is slight at best. To block the grand jury's access to the documents' *contents* on act-of-production grounds would allow a small and technical tail to wag a large substantive dog. Moreover, litigation concerning whether under particular circumstances the act of production rises to the level of testimonial self-incrimination—an issue of little direct importance to either party—places a needless burden on the courts and may harmfully delay critical grand jury probes.

There are several possible solutions to these problems, but in our judgment the simplest and best is to require production of the documents while automatically conferring upon a witness who has invoked his privilege a constructive use immunity with respect to any future use in a criminal prosecution of the act of production. The Sixth Circuit recently employed this procedure in *United States* v. *Schlansky*, No. 82-5200 (June 16, 1983), slip op. 7, where an IRS summons was enforced over Fifth Amendment objection. Noting that "[t]here [was] no serious question as to the existence or location of the documents," the court addressed the contention that the taxpayer might incriminate himself by means of the tacit

authentication inherent in the act of production (slip op. 7):

> This case does not concern an attempt by the government to use the act of production as authentication of the documents. If the government should attempt to authenticate the [documents] as evidence in subsequent criminal proceedings with proof that they were produced by the taxpayer, a Fifth Amendment objection could be interposed at that time. Such proof would seek to add testimonial value to the otherwise testimony-free act of production.

This procedure—requiring compliance with the subpoena over Fifth Amendment objection but excluding evidence of the act of production—allows the grand jury access to the contents of preexisting (and therefore unprivileged) business records; it avoids in nearly all cases the need to litigate the largely hypothetical question whether the act of production constitutes testimonial self-incrimination; and it fully protects the witness's Fifth Amendment rights. If the government seeks to introduce proof of the act of production against the witness in a subsequent criminal prosecution, "the witness has a valid objection to the evidence on the ground that he was coerced by court order to reveal it and that it is therefore compelled self-incrimination barred from use by the Fifth Amendment." *Manness* v. *Meyers*, 419 U.S. 449, 474 (1975) (White, J., concurring). Any evidence obtained by derivative use of the act of production would also be excluded, although it seems quite unlikely that the act of production could be put to such use.[33]

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[33] As previously noted, the existence and control of standard business records are almost always a foregone conclusion even before a subpoena for such records is issued. And insofar as the act of production indicates the sole proprietor's belief that the documents turned over are those listed in the subpoena, that "testimony" is not likely to lead to the discovery of other incriminating evidence. Consequently, excluding evidence of the act of production will almost always furnish a simple and complete remedy.

This procedure also does not compel the witness to incriminate himself with respect to the grand jury proceedings. Since the existence and control of standard business records are almost invariably a foregone conclusion, conceding those facts by producing such records does not amount to testimonial incrimination. And since grand jury evidence need not be authenticated, the possibility that the act of production might supply a needed method of authentication is not present.[34] Finally, any chance that the act of production might be used against the witness by the grand jury may be negated by allowing the witness to turn over the documents to a third party—such as the court or prosecutor—who would then furnish them to the grand jury without revealing their origin. Cf. *United States* v. *Porter*, No. 83-1278 (7th Cir. July 6, 1983), slip op. 14.[35]

While the Sixth Circuit has followed the procedure we believe preferable, the First Circuit has achieved the same end through a somewhat different approach, illustrated by its decisions in *Martinez* and *Doe*. In those cases, the court determined that compelling the possessor of subpoenaed documents to comply with the subpoena would produce incriminating authentication evidence. However, rather than simply quashing the subpoenas and thereby

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[34] Moreover, it is well settled that "an indictment valid on its face is not subject to challenge on the ground that the grand jury acted * * * on the basis of information obtained in violation of a defendant's Fifth Amendment privilege." *United States* v. *Calandra*, 414 U.S. 338, 344-345 (1974); see also *United States* v. *Blue*, 384 U.S. 251 (1966); *Costello* v. *United States*, *supra*.

[35] In *Porter*, the court prevented any possibility that the act of production might be used against the witness by requiring not only use immunity with respect to the act of production but also "a protective order forbidding the government from referring in any way before the grand jury or at trial to the fact that [the witness] produced the documents" (slip op. 14). While we believe that such a prohibition would be implicit in the exclusionary rule we advocate or in a grant of act-of-production immunity, we would have no objection to the entry of such a protective order as an additional safeguard of the witness's rights.

denying the grand jury access to the records' unprivileged contents, the court attempted to "[h]armoniz[e] the government's right of lawful access to the contents of personal business records with the possessor's right not to have the testimonial implication of his submission used against him * * *" (*Martinez*, 626 F.2d at 1056). Concluding that the federal immunity statutes, 18 U.S.C. 6002 and 6003, authorize the granting of act-of-production immunity (*ibid.*), the court remanded the case to the district court so that the government would have the opportunity to grant the sole proprietor use immunity with respect to the act of producing the subpoenaed documents (*id.* at 1058). The court in *Doe* followed the same procedure (628 F.2d at 697).

While we believe that the First Circuit was correct in holding that act-of-production immunity may be granted under 18 U.S.C. 6002 and 6003[36] and that such a grant removes any possible basis for resisting compliance with a documentary subpoena on act-of-production grounds, this procedure appears to us to be a needlessly burdensome one that may unnecessarily delay the grand jury's work without conferring any needed protection on the witness beyond that inherent in the automatic immunity approach. In any event, since the grand jury's objective in such cases is uniformly to secure access to contents of subpoenaed documents, not to obtain act-of-production authentication, we believe either method of recognizing the appropriate limited immunity would be satisfactory.

2. In the present case, the government urged the court to adopt one of these approaches. The government agreed in the district court not to use respondent's act of production against him in any way (see page 4, *supra*)

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[36] The immunity statutes were designed "to restrict the grant of immunity to that required by the United States Constitution." *United States* v. *Apfelbaum*, 445 U.S. 115, 122 (1980). Therefore, where the contents of subpoenaed documents are not protected by the Fifth Amendment privilege, a statutory grant of immunity may be limited to the arguably privileged act of production. See *United States* v. *Porter*, *supra*, slip op. 12 n.4.

and offered several suggestions for implementing that proposal. The government suggested that respondent turn over the documents to a third party, such as the district court or his own attorney (see J.A. 25; C.A. App. 74a-75a). Alternatively, the government suggested that the court could grant respondent "the functional equivalent of use immunity" with respect to the act of production (Memorandum in Support of Motion for Reconsideration at 22; see also J.A. 34-35).

The district court rejected all these suggestions without explanation, and the court of appeals affirmed, stating that "no procedure ever was agreed upon and no formal immunization offer under 18 U.S.C. § 6002 or § 6003 was advanced" (Pet. App. 19a).

The court of appeals' reasoning was completely unsound. Since the district court rejected all the government's suggestions, the government can hardly be faulted because "no procedure ever was agreed upon" (Pet. App. 19a). And statutory immunity was not sought[37] because respondent was permitted to rest upon a blanket assertion of the Fifth Amendment privilege with respect to the contents of all documents not required to be kept by law, despite the fact that no valid Fifth Amendment claim could possibly be made on that basis. It is well settled that the government need immunize only that portion of the requested evidence for which a valid claim of immunity has been raised; although "a grant of immunity must afford protection commensurate with that afforded by the privilege, it need not be broader." *Kastigar* v. *United States*, 406 U.S. 441, 453 (1972); see also *United States* v. *Apfelbaum*, *supra*, 445 U.S. at 122. Because

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[37] The government relied on Third Circuit precedent authorizing the granting of non-statutory immunity in analogous circumstances. *In re Grand Jury Empanelled (Markowitz)*, *supra*, 603 F.2d at 474 (hearing on applicability of attorney-client privilege); *In re Grand Jury Investigation ("A")*, 587 F.2d 589, 597-598 (3d Cir. 1978) (hearing on applicability of speech and debate clause); *United States* v. *Inmon*, 568 F.2d 326, 332-333 (3d Cir. 1977) (hearing on pretrial motion to dismiss on double jeopardy grounds).

respondent's Fifth Amendment claim was patently overbroad, the government was given the Hobson's choice of requesting that respondent be granted immunity to which he was not entitled or of suffering the consequences of a complete rejection of the subpoena.

The court of appeals also suggested that a judicial grant of use immunity with respect to the act of production would " 'intrude into an area which should be more appropriately left to prosecutorial discretion.' " (Pet. App. 20a, quoting *In re Grand Jury Matter*, 673 F.2d 688, 695-696 (3d Cir. 1982) (concurring opinion), cert. denied, No. 82-123 (Nov. 15, 1982)). However, the authority of the federal courts to create an exclusionary rule such as that adopted by the Sixth Circuit in *Schlansky* has strong precedent. See, *e.g.*, *Simmons* v. *United States*, 390 U.S. 377 (1968) (defendant's testimony at suppression hearing inadmissible at trial). Moreover, while we do not doubt that the prerogatives of the Executive Branch would be improperly abridged if a court conferred use immunity without the government's consent (see, *e.g.*, *United States* v. *Thevis*, 665 F.2d 616 (5th Cir.), cert. denied, 456 U.S. 1008 (1982); *United States* v. *Hunter*, 672 F.2d 815, 818 (10th Cir. 1982); *United States* v. *Drape*, 668 F.2d 22, 27 (1st Cir. 1982)), here, the prosecution itself has chosen to seek compelled production of the documents and is willing to accept the necessary consequences of conferring act-of-production immunity. We fail to see how prosecutorial discretion can be abridged if the prosecution's own immunity request is granted.

Even assuming that a formal request for statutory immunity was necessary, the court below should have followed the same course that the First Circuit took in *Martinez* and *Doe* by vacating the order quashing the subpoena and remanding so that the appropriate form of immunity could be extended. This procedure was especially appropriate in view of the district court's misconception about the scope of the immunity to which respondent was entitled. See *Martinez*, 626 F.2d at 1058. Not

only did the court of appeals refuse the government's request for such a remand, but the court's holding that the *contents* of a sole proprietorship's business records are privileged made it clear that no form of act of production immunity would have sufficed.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

ANDREW L. FREY
Deputy Solicitor General

SAMUEL A. ALITO, JR.
Assistant to the Solicitor General

JOEL M. GERSHOWITZ
Attorney

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